Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

FRANK CANEZ,

Petitioner,

vs.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA; CONSTRUCTION PRODUCTION MAINTENANCE LABORERS' UNION, LOCAL UNION NUMBER 383; MASON WARREN; ERMILO TORREZ; DAVID JACOBS; JAMES NORRIS; EARL NELSON; ROBERT DELANEY; GENE MONTIEHL; ERNEST HICKMAN; AND DANNY WILLIAMS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Ninth Circuit's decision conflict with this Court's decision in *Sheet Metal Workers v. Lynn*, 488 U.S. 347, 102 L.Ed.2d 109 S.Ct. 639 (1989), (holding that a union official may not be removed from office in retaliation for exercising his free speech rights at a union meeting), by holding that Petitioner's removal from union office was not retaliatory and did not deny his rights of free speech, voting and assembly guaranteed under 29 U.S.C. §411?

2. Does the Ninth Circuit's decision conflict with this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 211, 106 S.Ct. 2505 (1986), by finding that summary judgment was appropriate despite compelling evidence that Petitioner's firing was based upon pretextual grounds hiding the true reason for his firing, *i.e.*, to remove him from office so

that he could not exercise his rights of free speech and assembly to inform the local union members regarding Respondents' wrongdoing in the handling of pension fund monies?

3. May United States District Court judges properly grant summary judgment under Anderson, supra, by adopting factual and legal determinations made by a so-called union "Hearing Panel" made up of one hearing officer who is a Vice-President of a defendant in the then-pending case before the United States District Court where the allegations in the pending court action are made against that "Hearing Panel's" employer and where the prosecutor at the "hearing" was a fact witness on the dispositive issue on which summary judgment was based by the United States District Court?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Frank Canez, the twice popularly elected Business Manager, Secretary-Treasurer of Local 383 [the leader of the Local; hereafter Canez] and the Respondents: Laborers' International Union of North America (hereafter "International"); Construction Production Maintenance Laborers' Union, Local Union 383 (hereafter "Local 383"; International employees Mason Warren, Ermilo Torrez, and David Jacobs; and Local 383 Executive Board members James Norris, Earl Nelson, Robert Delaney, Gene Montiehl, Ernest Hickman, and Danny Williams.

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JURISDICTIONAL STATEMENT

Petitioner invoked federal jurisdiction in the Arizona District Court under 29 U.S.C. §§411, and 412.

On March 3, 1993 Magistrate Stephen L. Verkamp, sitting by stipulation, granted Defendants' Motion for Summary Judgment, holding that Petitioner had failed to adequately support violations under the Federal Labor Laws. See, Appendix A. The Ninth Circuit affirmed the summary judgment in an unpublished memorandum decision filed on November 13, 1994. *See*, Appendix B.

It thereafter modified its decision, but denied Petitioner's Motion For Rehearing and suggestion for Rehearing En Banc on June 12, 1995. *See*, Appendix E.

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONSTITUTION AMENDMENT VII

CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

29 U.S.C. §411

SUBCHAPTER II - BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

Bill of rights; constitution and bylaws of labor organizations

(a)(1) Equal rights

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership

meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the

organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations. . . .

(4) Protection of right to sue

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officer are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization,

before instituting legal or administrative proceedings against such organizations or any officer thereof. . . .

(5) Safeguards against improper disciplinary action

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Invalidity of constitution and bylaws

Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of not force or effect.

29 U.S.C. §503(a)

FINANCIAL TRANSACTIONS BETWEEN LABOR ORGANIZATION AND OFFICERS AND EMPLOYEES:

(a) Direct and Indirect Loans

No labor organization shall make directly or indirectly any loan or loans to any officer or employee of such organization which results in a total indebtedness on the part of such officer or employee to the labor organization in excess of $2,000.

STATEMENT OF THE CASE

Petitioner, the twice elected leader of Laborers' Local 383, was a trustee of the Arizona Laborers' Teamsters and Cement Masons, Local 395, Pension Trust Fund. (Ninth Circuit Excerpt of Record No. 1, p.3; hereafter "ER"; *see* Affidavits of Petitioner, Appendices F and G). He alleged in his verified complaint and affidavits the following: he had discovered discrepancies in the handling of the pension trust fund monies and reported his findings to Barry Hinkle, the lawyer for the Local, the International and for the pension fund trustees. (ER 1, pp.6-7). Hinkle's law firm had previously joined in bringing a suit against the pension fund advisers and managers seeking damages in excess of $50 million, alleging civil and criminal misconduct in the handling of the pension monies. (ER 1,

pp.7-9). During the pendency of the pension fund litigation Hinkle and International employee Ermilo Torrez continuously admonished Petitioner not to tell the Local members about his concerns that the fund managers and advisers had conspired with International representatives in the mismanagement of the pension fund that brought about the Pension Fund losses. (ER 1, p.9). Petitioner continuously questioned Hinkle as to whether the Pension Fund should be represented by independent counsel since Hinkle was the attorney for the Pension Fund when the losses occurred and was also representing the Pension Fund in litigation to recover the money, creating a potential serious conflict of interest. (ER 1, p.9).

In view of Hinkle and Torrez' conduct, and because of his concern about possible criminal misconduct, Petitioner undertook his own investigation. (ER 1, p.10). In

late 1989, he secretly began meeting with agents of the FBI to tell them about his knowledge concerning the pension fund losses and surreptitiously provided them pertinent financial records. *Id.*

A Notice to Participants of the pension funds was mailed in February 1990, falsely advising that the trustees had reason to be optimistic that the pension money would be recovered. (ER 1, p.10). Even though Petitioner was a trustee, he was not notified that this "feel good" Notice to Participants about the pension fund was to be sent. (ER 1, pp. 10-11). After he received a copy of the notice, Petitioner objected to Torrez and to attorney Hinkle about the contents of the notice because he did not believe it was truthful. Hinkle and Torrez admonished Petitioner not to disclose this information to the members. *Id.*

In February 1990, Petitioner borrowed $1,500 from the local to bury his father, after obtaining advice from Hinkle that he could borrow this money. (ER 1, pp.14-15). This loan was fully authorized under 29 U.S.C. §503. In March, 1990, while in Hawaii for an International Convention, Petitioner was confronted by Hinkle as to whether he had been speaking with the FBI. (ER 20, pp.2-3). Petitioner falsely denied this. *Id.* He was immediately taken by Hinkle to International Vice President Warren who advised Petitioner that he was directing International employee Jacobs to audit the books of the Local. (ER 20, pp.2-3).

On July 18, 1990, Canez was noticed for deposition in the pension fund lawsuit. (ER 21). Five days later, Jacobs confronted Canez about the loan, accusing him of acting wrongfully in taking the loan. (ER 20).

On July 28, 1990, Jacobs advised the Local's Executive Board that, under advice from the International's general counsel, Petitioner had to resign, both because of the loan and because $6,000 was alleged to be missing from the Local treasury. (ER 1, pp.16-17). At the monthly Local membership meeting that same day, Petitioner was prevented by Torrez from telling the members about the pension fund losses, and his investigation into the International wrongdoing and attorney Hinkle's and Torrez' possible complicity in the wrongdoing. (ER 1, p.17).

On August 8 and then again on August 10, 1990, the Executive Board summarily removed Petitioner as leader of the Local without any of his procedural rights guaranteed by the Local Constitution being afforded to him. (ER 13). On August 25, 1990, Petitioner was denied his right to run

the monthly general membership meeting of Local 383. On that same day he was denied his right to assemble and to speak to the membership about the truth concerning the pension fund losses and Hinkle's conduct and the International's complicity in allowing these losses to occur because Respondent members of the Executive Board shut down the meeting after it became apparent that their actions in removing Petitioner would be set aside by a vote of the Local members in accordance with the Local Constitution. (ER 24, ER 20, ER 1 pp.21-23).

At the September 29, 1990, monthly membership meeting, after the several hundred members in attendance voted by a margin of 20-1 to reject the Executive Board's decision to remove Canez from office, and despite the provision in the Local Constitution that Canez should be returned to office immediately in light of such vote,

the Executive Board members ignored the vote and continued to bar Petitioner from office.[1] (ER 24, ER 1, pp.27-28).

On October 22, 1990, Canez was served with charges signed by the entire Executive Board (including newly appointed member Morales who took the seat on the Executive Board created by Canez' ouster). International also suspended Local monthly membership meetings indefinitely. Doing so denied Petitioner a forum within which to meet with members and exercise his free speech rights as a member concerning the Pension Fund losses. It further denied him the opportunity to speak with the membership

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[1] Petitioner's counsel protested the denial of his rights and demanded he be afforded his procedural rights to notice and a hearing under the Local Constitution and that he be reinstated to his office after the vote at the Local meeting. These demands were ignored. (ER 1, pp.20-21; pp. 27-28).

regarding the pretextual nature of Respondents' conduct in ousting him for alleged financial mismanagement of Local funds when they were actually ousting him to cover up their own wrongdoing.[2] (ER 14-15).

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[2] As part of their conspiracy to deny Canez his rights under the "Bill of Rights of Member of Labor Organizations" (Title I, LMRDA, 29 U.S.C. §411), Respondents refused to allow Canez to be tried by a Local Trial Board. They accomplished this by the simple expedient of having the entire Executive Board sign the charges against Canez, even though Morales was not on the Executive Board when Canez was ousted. Morales was required to impanel a trial board but did not. Instead, he signed the charges in order to bring into effect the portion of the Local Constitution which provides that a member loses his right to a hearing on the local level before a seven person trial board if all of the Executive Board members sign the charges. His "trial" is then held by a "Hearing Panel" [made up of one person appointed by the International President] without any local membership participation. This totally anti-democratic provision was used by Respondents to circumvent Canez' right under Union Local Constitution to a trial by fellow Union members from the Local, a right guaranteed to him under the Local Constitution. (Article XII, Section 3, Local Constitution). This procedure as used by Respondents totally "impede[s] the democratic governance of the union." Lynn,

On November 20, 1990, a hearing was held before the United States District Court on Canez' request for a temporary restraining order and preliminary injunction. Judge Earl Carroll queried: "How could the Local Union remove Mr. Canez from office under these procedures that have been followed?" He also commented that the way Canez had been treated was "kind of like Alice in Wonderland Through the Looking Glass, a verdict now, trial later." Judge Carroll ordered Petitioner returned to office. (App. C-1).

On November 21, 1990, a hearing began before a single Union Hearing Officer (an International Vice-President chosen by the International President), who in turn was advised by an attorney from the International General Counsel's office. (SR 16, CR

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supra, 102 L.Ed.2d at 707.

134, ¶¶ 5-10). Incredibly, the Prosecutor was Barry Hinkle, a critical witness regarding the circumstances surrounding Petitioner's borrowing of the $1,500 and a central person in Canez' investigation into the pension fund losses.[3] *Id.* Hinkle ultimately testified as a witness in the "hearing" he was prosecuting and acknowledged that he advised Canez he could borrow the $1,500, but claimed he told Canez he had to leave "a chit" in the drawer acknowledging the borrowing.

Canez denied that Hinkle had told him to leave a chit. He testified that Sally Garcia, the Local bookkeeper, was fully advised regarding the loan and that no chit was required under Local accounting

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[3] Petitioner's counsel protested the holding of the hearing, Hinkle's participation as Prosecutor, and the International's lawyer acting as legal counsel to the Hearing Officer. These protests were ignored.

procedures. During the hearing, Petitioner tried to call Sally Garcia to testify regarding the circumstances surrounding the $1,500 loan. (CR 134, ¶¶ 11-14). However, the co-prosecutor (Hinkle's law partner) impliedly threatened Garcia with criminal prosecution regarding an alleged $6,000 in missing funds if Ms. Garcia testified regarding the circumstances of Appellant's $1,500 loan. Garcia was thus frightened out of testifying. *Id.*

The Hearing Officer absolved Petitioner of any wrongful conduct regarding the $6,000 in losses and regarding all other charges. However, he found that Petitioner's failure to advise Local members of the $1,500 loan was grounds for removal from office. (ER 16). Evidence presented to the Hearing Panel clearly established long-standing Local practice did not require reporting of loans to the members. 29 U.S.C. §503(a)

does not require it and fully authorized the loan. Members of the Local voted to reject the Executive Board's decision to remove their twice elected leader by a 20-1 margin. Nevertheless the International President affirmed the hearing officer's decision.

Based largely on the International's hearing panel's decision, Judge Carroll lifted the injunction and Respondents promptly removed Canez from office. (App. D-1). Magistrate Verkamp then granted Respondents' Motions for Summary Judgment, repeatedly relying on the decision of the International's one-man "hearing panel," rather than Petitioner's verified complaint and affidavits. (App. A-1).

On appeal, the Ninth Circuit initially held that summary judgment was proper on the free speech and assembly claims because Canez had failed to provide "substantial evidence that a purported reason for [his]

discipline is just a pretense for the punishment of speech" (App. B-8), and that under this "substantial evidence" test, "Canez failed to provide enough facts from which a fact-finder reasonably could draw an inference that Canez was dismissed for his speech." (App. B-9).

In response to Canez' Petition For Rehearing And Suggestion For Rehearing En Banc, the Ninth Circuit ordered Respondents to file a response. It then issued an order (App. E-1) deleting the language from the opinion requiring that Canez meet a "substantial evidence" test. However, once again it did not analyze the evidence of record under the standards required by Anderson, supra. It also ignored Canez' sworn proof that his removal from office for the sole reason that he borrowed the $1,500 and failed to report the loss to the membership was a pretextual rationalization

supplied by Respondents in order to remove Canez from office. It further ignored his proof that Respondents removed him to prevent him from exercising his rights to free speech, voting and assembly, and thereby insulate their own wrongdoing from judicial scrutiny.[4]

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[4] Ultimately the Pension Fund litigation was settled for approximately $90 million. *Arizona State Carpenters et al Pension Fund v. Miller et al, Dist. Az.*, CIV 89-00693. Hinkle's law firm settled claims made against it by the Fund's managers and advisers by paying money to their own clients (the Pension Fund) while acting as attorneys for that Fund in prosecuting claims against the Fund's managers and advisers! The actual losses to the Fund are estimated to be far in excess of $100,000,000.00. *Id.*

REASONS FOR GRANTING THE WRIT

I. Introduction

The Ninth Circuit has ignored this Court's decision in *Lynn, supra*, in a case that is directly analogous to *Lynn*. It did so by first misapplying the test for summary judgment by requiring Canez to prove, at the summary judgment stage, "substantial evidence" that his rights under the "Bill of Rights" were denied by Respondents. Then, after recognizing and correcting its legal error, the Ninth Circuit failed to analyze Petitioner's evidence in any respect or to apply the proper principles concerning the standards for summary judgment, as set forth in *Anderson, supra*.

This case provides a timely vehicle for this Court to reiterate the principles of *Lynn* in the context of a labor leader being denied his free speech, assembly, and voting rights. In addition, this case provides the

Court with an opportunity to decide a question of first impression under *Anderson, supra, i.e.*, what weight, if any, should be given by a United States District Court in deciding a summary judgment motion to factual determinations and legal conclusions made by an International's "hearing panel" (an employee of the International) where the International is itself a defendant in the then-pending civil action, where allegations have been made against the International in that action that it has conspired with its Local leaders and its lawyer to cover up wrongdoing in connection with millions of dollars of pension fund losses, and where the District Court judge largely based his decision to grant summary judgment in favor of the International on the hearing officer's decision.

1) The Ninth Circuit's Holding Directly Conflicts With This Court's Decision in *Lynn*, supra.

In *Lynn*, this Court held that "the removal of an elected business agent, in retaliation for statements he made at a union meeting in opposition to a dues increase . . . violated the LMRDA." 488 U.S. at 348. The Court pointed out that the Bill of Rights of the LMRDA was

> "designed to guarantee every member equal voting rights, rights of free speech and assembly, and a right to sue, ibid., the amendment was 'aimed at enlarged protection for members of unions paralleling certain rights guaranteed by the Federal Constitution.'" *Id.* at 352.

This Court there affirmed the Ninth Circuit's Statement that "allowing the removal of an elected official for exercising his free speech rights . . . would in effect nullify a member's right to vote for a candidate whose views he supports" and would impinge on the official's right to "speak

. . . for himself or a member of the Union." *Id.* at 351. This case is even more compelling than *Lynn* because Canez was the elected leader of the 2200 person Local, whereas Lynn was simply a business agent.

This Court noted that the ultimate issue to be decided is whether the conduct in question violates the LMRDA's basic objective "to ensure that unions [are] democratically governed and responsive to the will of the union membership as expressed in open, periodic elections." *Id.* at 354.

Here, Canez alleged that he was removed from office in retaliation for his having sought, while acting as the twice elected leader of the Local Union, to speak to the members about his belief Respondents had engaged in wrongdoing concerning pension fund losses. Canez claimed Respondents helped to cause the losses in the first

instance. He also claimed that they conspired with the Local's attorney to hide the attorney's wrongful actions in continuing to represent the trustees in a suit where that attorney and his client, the International representative of the pension fund Local, were alleged to have acted wrongfully in allowing the losses to occur.

For acting in the finest tradition of a courageous, honest labor leader, Canez found himself (as District Court Judge Carroll initially noted) turned upside down in an Alice in Wonderland world. Because of his removal from office, Petitioner was denied access to the membership to speak with them in union assemblies to tell them what his investigation had turned up and how the International was not adequately protecting their most precious material possession after their jobs, i.e. their pension money. He was peremptorily ousted from office by a

procedure that was declared by the United State District Court to be egregiously illegal (a holding never challenged by Respondents). (App. C-19). The members were deprived of Canez' "leadership, knowledge and advice at a critical time for the local." *Lynn, supra*, at 355. Based on *Lynn*, Canez clearly stated a cause of action under 29 U.S.C. §102. Accordingly, as in *Lynn*, Canez should have been permitted to go to trial on his allegations.

The Ninth Circuit incorrectly stated the question in terms of Canez claiming he was dismissed "for speaking out about the pension fund losses." (App. A-4). Rather, Canez claimed he was removed from office, and that the Local meetings were cancelled and the members' votes were ignored, to prevent him from having an opportunity to exercise his free speech, assembly and equal voting rights. Canez also claimed that this

all occurred in retaliation for his going to the FBI, for complaining about the misleading notice to the members about the pension fund losses and for trying to speak out at meetings only to have his voice stifled by Hinkle and Torrez or by the Executive Board in shutting down meetings, and to coerce him from testifying against Respondents in his deposition in the pension fund lawsuit.

2) Summary Judgment Is Not Appropriate In A Union Member's "Bill Of Rights" Case Where There Are Genuine Issues Of Material Facts As To Whether The Union Leader Was Removed In Retaliation For Exercising Those Rights. This Court Should Use This Case To State More Clearly The Principles To Be Applied In Deciding Motions For Summary Judgment, Requiring Lower Court Judges To Note Specifically What The Evidence Is And Why It Does Or Does Not Create A Genuine Issue.

This Court stated the basic principles governing decisions on motions for summary judgment in *Anderson*.

> "Summary judgment will not lie if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

This Court further held that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine if there is a genuine issue for trial." *Id.* at 249. Canez' evidence is to be believed "and all justifiable inferences are to be drawn in his favor." *Id.* at 254. Credibility determinations are jury functions. *Ibid.* Indeed, "credibility is exclusively for the jury" (Justice Rehnquist dissenting, *Id.* at 270).

Here the Ninth Circuit, without analyzing <u>any</u> of the evidence of record, and without applying any of these principles, simply concluded "Canez failed to provide enough facts from which a fact-finder reasonably

could draw an inference that Canez was dismissed for his speech." (App. B-9). By pronouncing with a grand wave of the pen over the record that "Canez failed to provide enough facts from which a fact-finder reasonably could draw an inference" to withstand summary judgment, without even analyzing the record evidence or applying the applicable principles, Petitioner was denied not only his right to a jury trial but also due process.

It is time for this Court, now that the lower courts have had almost a decade to ponder and apply *Anderson*, to state in no uncertain terms that this decision was not intended to allow a constitutional right to be swept aside and buried under judicial indifference (if not downright intellectual indolence). The pendulum has swung too far against plaintiffs since *Anderson*. The Seventh Amendment says nothing about judges

being able arbitrarily to take away a litigant's right to a jury trial.

The Ninth Circuit further demonstrated its lack of concern for intellectual probity (and its obvious lack of ease with its decision) by stating that even if it were wrong in its summary judgment analysis, Respondents could still throw Canez out because he borrowed $1,500.00 and then failed to report it (to a Local that when advised of the facts after-the-fact voted to keep him as their elected leader by 20-1 margin). The Ninth Circuit found that this conduct is analogous to Canez leaving the Local to start a rival union and interfering with contracts between the local and an employer, conduct which that court held in *Ferguson v. International Association of Bridge Workers*, 854 F.2d 1169 (9th Cir. 1988), was sufficient to cause the members to forfeit their free speech rights. This case of course has

nothing to do with *Ferguson*-type conduct--a case that was specifically limited by the Ninth Circuit to its own facts. However, the Ninth Circuit added here the *Ferguson* case as a make-weight to shore up its obviously inadequate analysis on the summary judgment issues. (App. B-9).

Ferguson involved a claim by union members that they had been removed from their union offices in violation of their §411(a)(2) freedom of speech rights. The union leader defendants claimed that the discipline imposed upon the plaintiffs was because they had left the union, started a second union, interfered with the existing contracts between defendant union and the employer and then, when they lost a representation election, attempted to reassert their rights as union members. It was in this context that they were disciplined not for exercise of their free speech, but

rather for starting a new union and for engaging in "conduct which threatened the union as an institution and interfered with the union's duties as collective bargaining agent." *Ferguson, supra*, 854 F.2d at 1174. The plaintiff union members there did "not contest the District Court's determination that the union could impose some penalty upon them for engaging in dual unionism [attempting to start a new union in competition with their union], and that the expulsion and suspensions constituted reasonable discipline for such conduct." *Id.* at 1173. The union members argued that "they were disciplined not only for dual unionism, but also for criticizing a union official and engaging in other speech." Further, that "as union members, their speech was absolutely protected under §101(a)(2) and that, as a result, they are immune from any discipline on charges that they engaged in both

dual unionism and speech." (Emphasis in original). *Id.*

Under these circumstances, the Ninth Circuit held that although "to be sure, they were also charged with criticizing a union official and engaging in other speech, we believe, however, that the essential element of the charges is dual unionism, not speech. We believe that unions may reasonably regulate speech which is part of a pattern of conduct designed to destroy the union and to interfere with the performance of its legal obligations." *Id.* The court held that "our holding today is limited to the facts of this case," *Ferguson*, 854 F.2d at 1175, and that since appellants had agreed that "suspension or expulsion is [not] unreasonable discipline for engaging in dual unionism, . . ." the District Court's decision that the appellants' suspensions and expulsions were reasonable was correct and that summary

judgment was appropriate in this "essentially dual unionism case." *Id.* at 1174.

Here, as distinguished from *Ferguson*, Canez did not leave Local 383 and did not seek to start another union. He did not seek to bargain with any contractors with which the local had contracts. He did not engage in dual unionism. *Ferguson* is therefore not properly a precedent for this case.

3) This Court Should Examine The Propriety Of District Courts Using Decisions By Hearing Panels As A Substitute For A Jury Trial, Particularly Where, As Here, The "Panel" Is An Agent Of A Defendant In The Lawsuit Making Findings That The District Court Then Relied Upon In Freeing That Defendant From Liability, In That Very Lawsuit.

The District court and the Ninth Circuit both gave great deference to the Hearing Panel's findings, *e.g.*, by approving the Panel's conclusion that Canez and the other members' right to vote under the Constitution could be swept aside in an "emergency"

such as was presented when Jacobs presented the trumped up charges against Canez prior to the August 8 removal meeting. (App. B-18).

There is no provision in the Local Constitution stating that a member's right to a trial at the local level by a Trial Board may be swept aside by an "emergency." Yet the International representative found such power to inhere in the Executive Board and the Ninth Circuit agreed! The Local Constitution absolutely requires an Executive Board member who does not have a conflict to appoint members from the membership-at-large to fill vacancies created by the disqualification of Executive Board members who do have a conflict. Here the District Court and Ninth Circuit held Canez could be deprived of his right to trial on the Local level by the simple expedient of Morales signing the charges against Canez

even though he had no conflict and had no reason (other than to trigger the provision forwarding the decision to the International President) for signing the charges.

The Ninth Circuit further approved the denial of Canez' right to a Trial Board trial because the procedure allowing the case to be transferred to the International President (and thereby be able to bypass a hearing on the local level) is "reasonable on its face because it allows the General President to step in when the Local membership is biased." (App. B-19). But, the Local membership was not biased <u>against</u> Canez. They wanted to retain him as their leader by a 20-1 margin. The Executive Board of the Local was biased against Canez, as was the International. They were defendants in Canez' lawsuit. The Executive Board, based upon International Auditor Jacobs' trumped-up charges, removed Canez

illegally as found by District Judge Carroll. Thus, as a matter of law, the International was biased. It was a defendant in the lawsuit when the "Hearing Panel" decided charges made by Canez against it. In effect, it decided its own case in favor (surprise!) of itself. The District Court and the Ninth Circuit then used the "Panel's" finding as evidence in support of granting summary judgment. This is Orwellian. It contravenes all of the principles enunciated in *Anderson*.

This Court should address this unconstitutional procedure and instead require that decisions on legal issues raised in lawsuits be decided by District Judges independently, not by agents of defendants who are allowed to decide their own liability without any due process constraints. If the LMRDA means anything regarding union democracy it does not mean that an Inter-

national Vice-President should have the power to decide whether an elected leader should be removed from leading the people who elected that leader in a case where that Vice-President's employer is a defendant accused of conspiring to deny the rights of the elected leader. The members of the local union were granted absolutely no say in this critically important decision. As this Court stated in *Lynn*:

> When an elected official . . . is removed from his post, the Union members are denied the representative of their choice. Indeed, removal [of the elected leader] deprived the membership of his leadership, knowledge, and advice at a critical time for the Local. *Lynn, supra,* 488 U.S. 355.

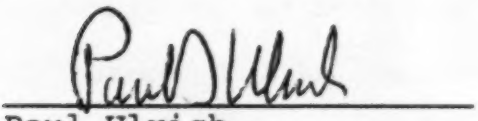
Here the Local members, who had their 20-1 vote to retain Canez as their leader nullified, were deprived of the leader of their choice at a critical time for the Local, *i.e.*, when the members' pensions were being lost by the malfeasance of the persons

entrusted with guarding as fiduciaries the members economic future.

II. CONCLUSION

For the foregoing reason the Petition for Certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

Paul Ulrich, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for petitioner in this cause; that on this 11th day of September, 1995, he mailed three copies of petitioner's Petition for a Writ of Certiorari in this cause by depositing the same in the United States mail, first-class postage prepaid, to:

Victor J. Van Bourg, Esq.
James Rutkowski, Esq.
Sandra Rae Benson, Esq.
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LABORERS' INTERNATIONAL UNION OF North America
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Washington, D.C. 20006-1765

Michael Barrett
CONNERTON, RAY & SIMON
1920 L Street, NW
Washington, D.C. 20036

and that he also mailed forty copies of Petitioner's Petition for a Writ of Certiorari to the Clerk of this Court,

first-class postage prepaid; all in compliance with Supreme Court Rule 28.

Paul Ulrich

SUBSCRIBED AND SWORN to before me this 11th day of September, 1995.

Notary Public

My commission expires:

October 18, 1995

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FRANK L. CANEZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV 90-1614 PHX SLV
	)	
	)	
LABORERS' INTERNATIONAL etc., et al.,	)	O R D E R
	)	
Defendants.	)	
	)	

Presently pending before the court are a Motion for Partial Summary Judgment filed by Plantiff Frank Canez and Motions for Summary Judgment filed by the Defendants.

I. ISSUES PRESENTED

Canez alleges in his Complaint that the defendant International conspired with the Executive Board members of the defendant Local to remove him from his position as Business Manager/Secretary-Treasurer of Local 383 and thereby deny him his rights

under Section 101 of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §411[1].

He also claims that the defendants violated certain procedural rights guaranteed to him in the union constitutions and that his wrongful removal from office is actionable pursuant to 29 U.S.C. § 185[2].

II. THE STANDARD FOR SUMMARY JUDGMENT

Rule 56(c), Fed. R. Civ. P. provides that summary judgment "shall be rendered forthwith if the pleadings, depositions,

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[1] 29 U.S.C. § 411, et seq. is the Bill of Rights of Members of Labor Organizations.

[2] 29 U.S.C. § 185 provides for suits for violation of contracts between an employer and a labor organization. The subject matter jurisdiction conferred on the district courts by this section extends to suits on union constitutions brought by individual union members. *Woodell v. International Brotherhood of Electrical Workers, Local 71, 112 S.Ct. 494, 498 (1991).*

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986).

Substantive law determines which facts are material. *Id.* at 248, 106 S.Ct. at 2510. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

The dispute must also be genuine. A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving

party." *Id.* There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict of that party. *Id.* at 249, 106 S.Ct. at 2511. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Id.*

In resolving a summary judgment motion, the evidence of the opposing party is to be believed and all justifiable inferences are to be drawn in his favor. *Id.* at 255, 106 S.Ct. at 2513. Inferences are not to be drawn out of the air, however, and it is the opposing party's obligation to produce a factual predicate from which the inferences may be drawn. *United States v. H.C. Angle*, 760 F.Supp. 1366, 1371 (E.D.Cal. 1991).

The standard for whether or not a motion for summary judgment should be granted mirrors the standard for a directed verdict

under Federal Rule of Civil Procedure 50(a); that is: the trial court must direct a verdict if there can be only one reasonable conclusion as to the verdict. *Anderson* at 250, 106 S.Ct. at 2511. The primary difference between a motion for summary judgment and a motion for a directed verdict is procedural: motions for summary judgment are usually made before trial and decided on documentary evidence, while motions for directed verdict are made at trial and decided on the evidence that has been admitted. *Id.* at 251, 106 S.Ct. at 2512.

When a party moves for summary judgment, the judge must decide, not whether the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the opposing party on the evidence presented. The mere existence of a scintilla of evidence in support of the

opposing party's position will be insufficient; there must be evidence on which the jury could reasonably find for that party. *Id.* at 252, 106 S.Ct. at 2512.

Credibility determinations, the weighing of evidence and the drawing of legitimate inferences from the facts, are functions, not of the judge, but of the jury. *Id.* at 255, 106 S. Ct. at 2513.

When a moving party does not have the burden of proof at trial, that party need show only that the opponent cannot sustain his or her burden at trial. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986). As stated by the Supreme Court in *Celotex Corp. v. Catrett:*

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which

> that party will bear the burden of proof at trial. In such a situation there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

III. UNDISPUTED FACTS

The following facts are undisputed:

Frank Canez was a member in good standing of Local 383 during all relevant times. Proposed Pretrial Order [hereinafter "PPO"], p.2.

A Local Union Constitution entitled Uniform Local Union Constitution and an International Constitution entitled International Union Constitution governed the rights, responsibilities and relationships between Frank Canez, the Local Union and the International Union. *Id.*

Canez was a trustee of the Laborer's Pension Fund from 1986 until he was removed from that position by virtue of being removed as the Business Manager/Secretary-Treasurer of Local 383 by vote of the Executive Board of Local 383 on August 8, 1990. Canez Aff. 9/14/92, p.1.

Barry Hinkle was a lawyer for Local 383. He also represented Hermillo Torres, one of the defendants in this action. Torres was an employee of the International Union and sat as a pension Fund trustee. *Id.* at pp.1-2. Prior to taking a loan in February 1990, Canez consulted Hinkle and received his legal opinion that he was allowed to take the loan. Canez believes that Sally Garcia, the bookkeeper for the Local, made a notation in her records concerning the loan. Canez Aff. 1/25/93, p.1. In February 1990, a letter containing

false information and important factual omissions was sent to the Pension fund participants. It led the members to believe that their Pension funds were safe and secure. Hinkle knew that losses of upwards of $70 million either had been or would be sustained as a result of violation of law in relation to the administration of the Trust. Hinkle was an attorney for Local 383 when these losses were sustained. When Canez complained about the letter of February 1990, Hinkle admonished him not to discuss with the membership of Local 383 his suspicions regarding Defendants' possible liability for allowing these losses to occur. Canez Aff. 9/14/92 at pp.1-2.

In May of 1990, the International Union authorized David Jacobs to conduct an investigation of the affairs of Local Union 383. In the course of this investigation, Jacobs

discovered a number of discrepancies in the financial records of the Local. These discrepancies included cash shortages and alterations of accounting records. Jacobs Aff. 11/20/90, p.2.

Prior to Jacob's investigation, the members of the Executive Board were unaware of a loan Canez made to himself and were unaware that any other sums of money were missing from the Union. Norris Aff. 11/12/90, p.2; Nelson Aff. 11/12/90, p.2; Montiehl Aff. 11/12/90, p.3; Hickman Aff. 11/11/90, p.2; Williams Aff. 11/13/90, p.2.

The Executive Board of Local 383 voted to remove Canez from office as Business Manager/Secretary-Treasurer at a meeting dated August 8, 1990. PPO at p.2; Nelson Aff. at p.2; Montiehl-Aff. at p.3; Hickman Aff. at p.3; Williams at p.3.

The Executive Board ratified their

action of August 8, 1990, removing Canez, at a meeting on August 10, 1990. PPO at p.2; Nelson Aff. at p.5: Norris Aff., Ex.E; Montiehl Aff. at p.4; Hickman Aff. at p.4; Williams Aff. at p.4.

The Executive Board voted to appoint Earl Nelson to fill the vacancy of Business Manger/Secretary-Treasurer, to appoint James Norris to fill the vacancy of President which Nelson vacated, and to appoint Ernest Hickman to fill the vacancy left by Norris. Nelson Aff. at p.4 and Norris Aff. at p.5 and Ex. D; Montiehl Aff. at p.3; Hickman Aff. at p.3. On August 25, 1990, the Executive Board voted to appoint Ramon Morales, Jr. to fill the Executive Board seat vacated by Ernest Hickman. PPO at p.3.

In addition to the audit report by Mr. Jacobs, an independent verification audit was conducted of the Local Union's books and

records. The independent accounting firm of Van Kuelen and Lumer conducted this audit and on October 1, 1990, Van Kuelen and Lumer issued its report verifying the losses reported by Jacobs. In addition, Van Kuelen and Lumer discovered that approximately $6,200.00 of additional Union funds had been "converted" prior to January 1, 1990. Nelson Aff. at p.8; Norris Aff. at p.4 and Ex.C; Montiehl Aff. at p.4; Hickman Aff. at p.4; Williams Aff. at p.4.

Upon receiving the report of Van Kuelen and Lumer, on or about October 3, 1990, the Executive Board filed formal charges against Canez listing nine specific violations of the Union's Constitution. Nelson Aff. at p.7; Norris Aff. at pp.8-9; Hickman Aff. at p.4; Montiehl Aff. at p.4; Williams Aff. at p.4.

The members of the Local Union

Executive Board who signed the charges against Canez were his political allies and had been recruited by Canez to run on his slate for Local Union office in 1989. Norris Aff. at p.9; Delaney Aff. 11/12/90, p.2; Williams Aff. at p.5; Hickman Aff. at p.4; Montiehl Aff. at p.4; Morales Aff. 11/12/90, p.2; Nelson Aff. at p.8.

Pursuant to his authority under Article XII, Section 3 of the Uniform Local Union Constitution, the General President of the International Union appointed a hearings panel to hear the charges filed by the Executive Board against Canez. Welborn Decl. Ex. G.

Article XII, Section 3 of the Uniform Local Union Constitution provides:

> The members of the Executive Board of the Local Union shall constitute the Trial Board; except that neither the charging party nor the accused nor any member directly interested or involved in the

charges may sit as a member of the Trial Board.

In such cases, the President of the Local Union shall appoint a substitute or substitutes from the members in good standing. If the President is to be disqualified, then the Vice-President shall appoint a substitute or substitutes; and if he is also to be disqualified, then the substitute shall be appointed by the remaining Trial Board members.

Where the entire Executive Board of a Local Union appears to be disqualified, the matter may be referred to the General President who shall be entitled to investigate to determine whether such disqualification exists. Upon a finding of disqualification, the General President shall assume original jurisdiction over such charges, in which case he shall appoint a Hearings Panel of the General Executive Board to hear such charges and report its findings and recommendation to the General Executive Board for final decision and disposition; or, in his discretion, the General President may refer the charges to the appropriate District Council for trial.

Welborn Decl. Ex.A at p.37.

The General President appointed Vice

President and Regional Manager Herbert Lobdell as the hearing "panel" to hear the charges against Canez. Lobdell had no prior dealings with either the charging or charges parties within Local 383. Lobdell Aff. 11/15/90, p.1.

The hearing before Vice President Lobdell was commenced in Phoenix, Arizona on November 21, 1990 and lasted five days. A verbatim record of the proceedings was ordered by the panel and the resultant transcript made available on an equal basis to all parties. Welborn Decl. Ex.E at p.217. The hearing followed organizational law as described in Article XII of the Uniform Local Union Constitution. Welborn Decl. Ex.A at pp.38-42.

Canez attended the hearing and was represented by counsel. During the hearing, fourteen exhibits were presented by Canez

and seven were presented by the Charging Parties. Welborn Decl. Ex. F.

At the hearing, Canez was accorded and exercised rights provided under organizational law, including: the right to be represented by counsel of choice; the right to call witnesses; the right to examine witnesses against him; the right to present a case; and the right to have equal access to a verbatim transcript. PPO at p.5.

Both Ramon Morales and Ernest Hickman appeared at the hearing, although they did not testify. Benson Decl. 9/11/92, p.2.

The hearing panel received the following evidence, *inter alia*:

> At some point in late 1989 or early 1990, Canez asked the Local Union attorney, Barry Hinkle, whether it would be lawful for him to receive a loan from the Union. Hinkle advised him that it would be lawful for the Union to lend him up to $2000.00 and that Canez should "leave a chit in the cash box for the loan." Tr. p.581.

> Hinkle never advised Canez that the loan could be off the books or a secret between Canez and the bookkeeper, or that Canez could avoid reporting the loan to the Executive Board or the membership. Tr. pp.1168-70.

Canez took $1,500.00 in cash from the Union's receipts and when Sally Garcia, the Union's bookkeeper, gave him a receipt to sign for the $1,500.00, he refused to sign it. Tr. pp.1173-74. Canez never reported the loan to the Executive Board, nor did he report it to the membership in his monthly report of expenses. Tr. p.1181.

Despite having made arrangements with Sally Garcia to repay the loan, Canez decided not to pay the loan back to the Union until Garcia returned from an extended sick leave because, as he testified, "my responsibility was to Sally." Canez further testified that it never crossed his mind that his responsibility was to the Union and

not to Sally Garcia. Tr. p.1178.

In April, 1990, the General President of the International Union directed that an audit be conducted of the financial affairs of Local Union 383 because of its persistent failure to pay the per capita tax required of all Local Unions as a condition of their affiliation with the International Union. Canez Hearing Ex. 5, Welborn Decl. Ex. F.

International Auditor David Jacobs was assigned the task of auditing Local 383, which he began by examining the Local Union's books and records and interviewing its bookkeeper. This audit revealed that approximately seven thousand dollars was missing from the Local Union's funds for the audited period of January through June, 1990 Tr. 40.

On July 4, 1990, Jacobs questioned Sally Garcia about the missing funds.

Garcia generally refused to answer questions concerning missing funds and told Jacobs to "talk to Mr. Canez." Tr. 44-45.

Jacobs testified that he then questioned Canez about this matter on July 5, 1990, because Canez was the Local Union's Secretary-Treasurer and chief financial officer. Jacobs testified that Canez denied any knowledge of any of the missing funds. Tr. 45. Jacobs testified that he first learned on July 24, 1990 that Canez admitted to taking $1,500.00 of the missing Union funds. He received this information from Barry Hinkle, an attorney for the Local. Tr. 120-21.

Canez testified that he first spoke to Jacobs about the missing funds on July 23, 1990 and that he informed Jacobs of the loan at that time. Tr. 1112-13.

No record of this loan had been made by

either Canez or Garcia despite the fact that Canez had executed receipts for other money he had received from the Local Union. Tr. 1138-39. Canez also admitted that Garcia specifically asked him to sign a receipt of the money and he refused. Tr. 1098.

Both Jacobs and an independent accountant discovered during their audits, that while Canez was Secretary-Treasurer, an illegitimate bookkeeping practice known as "lapping" had been used at Local 383. Tr. 42; 264-65.

Jacobs solicited an opinion from the International Union about a Local Union's obligations under its surety bond covering employees handling Local Union funds and under federal law. Tr. 42-48.

An opinion was issued by counsel to the International Union which explained the requirements of the bonding company and

federal law on these issues. Tr. 47; Norris Aff. Ex. B.

Jacobs delivered a copy of this legal opinion to the Local Union Executive Board, including Canez. Tr. 48.

At the membership meetings in August and September, 1990, a small group of Canez supporters disrupted the meetings by shouting out of turn and threatening violence. Tr. 612-22.

At the September meeting, the Local Union Executive Board members were held in the meeting hall against their wishes while Canez and two comrades harangued them and the meeting. This situation ended only after the police were called. *Id.*

Canez was not paid his salary or benefits as the business Manager/Secretary-Treasurer for the time period August 8, 1990 through December 3, 1990. PPO at p.3.

Canez was reinstated as business Manager/Secretary-Treasurer by a preliminary injunction issued by the United States District Court on November 28, 1990. He retook his office on December 3, 1990. PPO at p.3.

In February 1991, the Hearings Panel issued its Findings and Recommendations which were then adopted by the General Executive Board of the International Union on February 11, 1991. Welborn Decl. Ex.D.

The decision dismissed all but two of the nine charges leveled against Canez by the Local Union and dismissed all charges against another charged party. The Hearing Panel found that Canez had improperly loaned himself $1,500.00 from Local union funds without authorization. *Id.* The Panel found that Canez should be disciplined for this incident only because he had actively

concealed his self loan by failing and refusing to record the transaction and by failing to disclose it to the International Union Auditor who was investigating the missing funds. The Panel found that "[i]n failing to acknowledge the loan, Canez breached the fundamental trust of his office" and that "[t]he long-term and deliberate nature of Canez' misconduct makes his further holding of office untenable." *Id.*

Canez was also found guilty of exploiting the disorder and disruption at the August and September meetings, whether or not he was directly responsible for that disruption. *Id.*

Consequently, Canez was ordered removed form his official positions in Local 383 and barred from attending the monthly membership meetings for a period of six consecutive months. *Id.*

The Hearing Panel found that the action of the Executive Board, on August 8 and 10, in removing Canez from office, was not only proper under the Uniform Local Union Constitution, but under the circumstances, it would have been irresponsibly negligent for the Executive Board to have failed to take such emergency action. *Id.*

The Panel found that the Executive Board had the emergency power to remove Canez on August 8, but that Canez was not provided with the timely hearing required by the Local Union Constitution.

Because Canez was ultimately removed from office for misconduct, the Panel found that he suffered no injury from the Executive Board's failure to provide him with a timely hearing on disciplinary charges. According, the Panel found that Canez was not entitled to back pay. *Id.*

The injunction pursuant to which Canez had been reinstated was lifted on June 5, 1991. PPO at pp.3-4. On June 10, 1991, the Executive Board removed Canez from office. Canez was paid his full salary and benefits for the time period December 3, 1990 through June 13, 1991, but has not received Salary or benefits as the business Manager/ Secretary-Treasurer since that time. *Id.* at p.4.

Pursuant to Article VIII (a-viii) of the International Constitution, Canez had a right to appeal from the decision of the General Executive Board to the regular Convention of the International Union. Canez did not appeal from the decision of the General Executive Board. *Id.* at p.5.

IV. DISCUSSION

A. 29 U.S.C. § 185.

1. Alleged Removal from Office in Violation of Local Constitution.

Canez claims that the defendant Local breached the Local Constitution by removing him from office in August, 1990 without providing him with sufficient notice or an opportunity to prepare a defense. He asserts, therefore, that he is entitled to lost income and benefits from the day of his initial removal through the day he was reinstated pursuant to the court's preliminary injunction.

To support this contention, he relies upon language contained in the court order granting a preliminary injunction, dated November 28, 1990, that "Frank Canez was, in a practical effect, removed from office in violation of ... the Uniform Local Union Constitution"; his reliance is misplaced, however, for Defendants' motion to reconsider this order was granted and the preliminary injunction was subsequently lifted.

Canez also relies upon a finding of the Special Hearings Panel that the Executive Board had a duty to bring charges and conduct a Trial Board by September 7, 1990; but he ignores the fact that the Special Hearings Panel also found the emergency action of the Executive Board, in administratively removing Canez from office, to be completely justified and found that inasmuch as this action was ultimately upheld at a full hearing, Canez suffered no harm from this violation.

The unrefuted evidence before the court at this time demonstrates that any deficiencies referred to by the court in its order dated November 28, 1990 have all been cured. Canez was provided with a full hearing beginning on November 21, 1990. Subsequent to the hearing, the findings of the Panel were presented to this court. Canez has

offered no support, factual or legal, for his presumption that the Union Constitutions preclude the emergency action taken by the Executive Board of Local 383. On the contrary, the General Executive Board found that the Executive Board of the Local properly executed its emergency powers, and that indeed, it would have been negligent for it to have failed to take the immediate action which it did.

Furthermore, the Board found that Canez, having been removed from his office for cause, was not entitled to any back pay or benefits. The Board found the only violation of the Union Constitution to be the failure to provide Canez with the hearing in a timely manner. This failure was held to have been harmless, however, in light of the ultimate finding that there was just cause for his dismissal.

The court's standard of review of a union's interpretation of its own governing documents and regulations is highly deferential, absent bad faith or special circumstances. *Building Material and Dump Truck Drivers, Local 420 v. Martino*, 867 F.2d 500, 511 (9th Cir. 1989). Although Canez argues strenuously that such bad faith exists, he has presented this court with no evidence in support of this assertion. The unrebutted evidence before this court is that Canez was provided with a full and fair hearing. Even the failure to provide such a full and fair hearing is not in and of itself sufficient to establish the bad faith necessary to disturb a union's interpretation of its own constitution. *Id.*

2. Alleged Failure to Provide Plaintiff with Trial Board Composed of Local Union Members.

Canez next argues that Defendants

breached the Union Constitutions by failing to provide him with a Trial Board composed of Local Union members. He advances two rationales for this proposition.

He claims first that under the Union Constitution, charges may be preferred only by a single officer or member in good standing and not by the entire Executive Board.[3] Thus, he reasons, since the entire Executive Board signed the charges, the Executive Board must be the charging party; and inasmuch as the Board itself is not authorized to be the charging party, the Local Constitution was violated in a substantive and material way. We agree with Defendant International that such a reading is "utter nonsense." There is no language in the Constitution which prohibits more

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[3] The relevant provision provides: "An officer or member in good standing may prefer charges..."

than one person from preferring charges. Furthermore, any possible violation of this sort was certainly not substantive or material.

As for the assertion of Canez that Ramon Morales, Jr. was only motivated to sign the charges in order to disable himself from implementing the provisions of the Constitution which allow a member to be tried at the local level, it is far from "patent" that this was Morales' motive. In fact, there is no evidence whatsoever to support this theory. The evidence is irrefuted that Morales was directly interested and involved in the charges, having been appointed to the Executive Board as a result of Canez' removal. Furthermore, Morales himself has denied any improper motive, Morales Aff. at pp.2-3, and Canez has failed to offer any evidence to the contrary.

3. Alleged Failure of All Charging Parties to Appear.

Canez alleges that the failure of all of the charging parties to appear at his hearing necessitated the dismissal of the charges.[4] He asserts that the International Union Hearing Panel treated the entire Executive Board as the charging party, and since that charging party in its entirety did not appear at the hearing[5], the charges should be dismissed. This argument rests entirely on the presumption that the Executive Board members filing the charge must be treated as a single entity and that, if the entire entity does not appear, the "charging party" has not appeared. Not only

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[4] "If the charging party fails to appear, the charges shall be dismissed." Article XII, Section 4 of the Local Constitution.

[5] Canez alleges that Morales and Ernest Hickman failed to appear at the hearing.

does Canez offer no legal authority for this proposition, but the undisputed fact is that both Morales and Hickman did appear, although they did not testify. Benson Decl. 9/11/92, p.2. There is no evidence that the Constitution requires that the charges be dismissed if all charging parties fail to testify.

4. Alleged Failure of Disqualification.

Canez next reasons that the failure of Morales and Hickman to appear at the hearing deprived them of the status of charging parties; if they were no longer charging parties, he concludes, they were not disqualified from conducting his hearing at the Local Union Level and therefore, the International Union lost jurisdiction. As mentioned above, the undisputed evidence before the court is that Morales and Hickman did appear. Consequently, this argument fails.

Furthermore, even if Morales and Hickman did lose their status as charging parties, there is no evidence that they were no longer directly interested or involved. Their direct interest or involvement would disqualify them from serving on a trial board as readily as their status as charging parties. Welborn Decl., Ex. A., pp.36-41.

5. Alleged Failure to File Written Charges.

Canez next argues that written charges were never filed in duplicate with the Recording Secretary of the Local Union, as required by Article XII, Section 1 of the Local Constitution. He has presented no evidence in support of this allegation and even if true, it is not a substantive or material violation of the Constitution.

6. Alleged Failure to Properly Refer Charges.

Canez next asserts that his charges

were not properly referred to the International Union because no one is designated in the Constitution as having the power of referral if the entire Executive Board is disqualified from serving on the Trial Board. He concludes that the charges may not be referred without his consent, inasmuch as the provision for referral upon disqualification of the entire Executive Board is permissive, not mandatory[6]. *Id.* Not only do we fail to see the logic in this reasoning, but the only evidence before the court is that it has ben the consistent

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[6] Article XII, § 3 provides, in pertinent part:

> Where the entire Executive Board of a Local Union appears to be disqualified, the matter *may* be referred to the General President...

(Emphasis added)

practice of the International to accept such referrals from any Local Union officer. *See* D'Avella Decl. 9/14/92, p.2.

7. Alleged Failure to Meet Burden of Proof.

Canez contends that Defendants did not meet their burden of proof at the hearing. The standard for judicial review of a finding of guilt at a union disciplinary hearing is "some evidence." *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO v. Hardeman*, 401 U.S. 233, 245-46, 91 S.Ct. 609, 617, 28 L.Ed.2d 10 (1971). "A stricter standard...would be inconsistent with the apparent congressional intent to allow unions to govern their own affairs, and would require courts to judge the credibility of witnesses on the basis of what would be at best a cold record." *Id.* at 246, 91 S.Ct. at 617.

The record before this court indicates that there was more than enough evidence introduced against Canez to uphold the findings of the Trial Panel.

8. Alleged Arbitrary Application of Constitution.

Finally, Canez argues that the Union Constitution was applied arbitrarily, capriciously and maliciously. Once again, he has presented no factual basis for this bald assertion. The evidence presently before this court is totally to the contrary.

B. 29 U.S.C. § 411.

Canez alleges that the defendant International conspired with the Executive Board members of the defendant Local to remove him from his position as Business Manager/Secretary-Treasurer of Local 383 and thereby deny him his rights under 29 U.S.C. §411. He charges that the reason set forth by Defendants for his removal from office

(the alleged breach of his fiduciary duty to the Local) was a mere pretext, and he bestows Defendants with numerous nefarious motives for their conspiracy, among which were the desire of the International Union to see that the Local's activities were controlled by "Anglos" and the desire to prevent Canez from cooperating with a Government investigation into certain Pension Fund losses.

This contention must fail for two reasons. In the first place, Canez has once again failed to present the court with any evidence whatsoever to support his theory. It is undisputed that Barry Hinkle warned Canez not to discuss with the membership of Local 383 his suspicions regarding Defendants' possible liability for allowing certain trust fund losses to occur. From this sole fact, Canez would have a jury

infer the existence of a conspiracy to silence him. This is an insufficient factual predicate from which to ask a fact-finder to draw a legitimate inference. There is undisputed evidence which tends to diminish the probability of a conspiracy. The audit which uncovered the undocumented loan was conducted in response to the Local Union's admitted financial problems. Welborn Decl. Ex. C; Tr. 1103-04. The Executive Board members who signed the charges against Canez were his friends and political allies. Tr. 623: Morales Aff. at p.2; Norris Aff. at p.9: Delaney Aff. at p.2; Williams Aff. at p.5; Hickman Aff. at p.4; Montiehl Aff. at p.4; Nelson Aff. at p.8. All of these Local Union Officers specifically deny that they were influenced by the International Union in their decision to prefer charges against Canez. They each

claimed to have been motivated by what they termed to have been Canez' betrayal of his trust and what each officer believed to be in the best interest of the Local Union. *Ibid.*

Secondly, an improper motive on the part of Defendants, even if extant, does not necessarily immunize Canez from discipline based upon his own misdeeds. The LMRDA expressly recognizes the right of a union "to adopt and enforce reasonable rules as to the responsibility of every member toward the organization...and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." 29 U.S.C. § 411(a) (2); *Ferguson v. International Association of Bridge, Structural and Ornamental Iron Workers,* 854 F.2d 1169, 1174 (9th Cir. 1988).

Grounds urged by a union for discipline may not be a mere subterfuge for an improper motive. *See Bise v. International Brotherhood of Electrical Workers, AFL-CIO Local 1969*, 618 F.2d 1299, 1309 (9th cir. 1979), quoting *NLRB v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 470 F.2d 57, 62 (2nd Cir. 1972) ("It matters not that the grounds urges by the Union to support its disciplinary action may have a semblance of lawfulness if the true motivation for the action was unlawful"). This is not a situation, such as existed in *Bise*, where there was substantial evidence in the record to support a jury finding that the true motivation of the Union was to punish the plaintiffs for exercising their rights of freedom of

speech and assembly. On the contrary, Canez has offered nothing more than speculation and innuendo to support this theory. The overwhelming evidence before this court is that Canez wa disciplined for a breach of his fiduciary duty, not for exercising his rights to free speech. In a case such as this one, "as long as an accused receives a fair trial and an impartial determination of guilt on specified charges, motive of the accuser is irrelevant." *Burke v. International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers*, 302 F.Supp. 1345, 1353 (N.D. Cal. 1967), aff'd, 417 F.2d 1063 (9th Cir. 1969).

Although Canez alleges that he did not receive a fair and impartial trial, he has provided no factual support for this assertion. *See Ferguson*, 854 F.2d at 1176-77. Charges that bias undermined the fairness of

a disciplinary proceeding must be supported by specific factual allegations from which the operation of bias can be inferred. *Frye v. United Steelworkers of America*, 767 F.2d 1216, 1225 (7th Cir. 1985). General and conclusory allegations are insufficient to support a claim of bias.

There is undisputed evidence that Canez was charged with making himself an improper loan and found to have breached his fiduciary duty to the Local Union. The presence of a purported attempt by Canez to exercise his right to free speech does not protect him from discipline imposed for such a breach. *See Petramale v. Local No. 17 of Laborers International Union of North America*, 736 F.2d 13, 17 (2nd Cir. 1984).

C. **FAILURE TO SUPPLEMENT COMPLAINT AND FAILURE TO EXHAUST REMEDIES.**

Canez filed his Complaint on October

17, 1990, slightly more than two months after his summary removal from office by the Local Union. To the extent that Canez is seeking affirmative relief, based upon events occurring prior to the filing of his original Complaint, he was under no obligation to exhaust administrative remedies, inasmuch as there were none available to exhaust;[7] but to the extent that Canez is arguing that he is entitled to affirmative relief, whether legal or injunctive in nature, based upon occurrences subsequent to October 17, 1990, the date he filed his Complaint, the court is of the opinion that

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[7] The court reasoned, in its order granting a preliminary injunction, that Canez was not under an obligation at that time to have exhausted his administrative remedies: "[B]ecause there were no formal charges or findings of the Executive Board made, despite Canez's request for such documents, and no hearing which satisfies the requirements of federal statute and union constitutions, there was nothing to appeal."

he is up against two barriers.

First, we not that Canez never sought to supplement his complaint with allegations regarding subsequent events:

> [I]t is not necessarily appropriate for the Court to consider allegations of violations that have occurred subsequent to the filing of the [original pleading]. If the plaintiff wishes to present such allegations and/or wishes to rely upon them as additional support for a preliminary or permanent injunction, the plaintiff should file a supplemental complaint pursuant to Rule 15(d), Fed. R. Civ. Proc., which provides in pertinent part:
>
> > 'Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.'

Selelyo v. Drury, 508 F.Supp. 122, 128 (1980).

Having failed to supplement his Complaint, this court is of the opinion that Canez may not rely upon such subsequent events in opposing Defendants' Motions for Summary Judgment.

Additionally, Canez had a right and an obligation, pursuant to Article VIII (a-viii) of the International Constitution, to appeal from the decision of the General Executive Board to the regular Convention of the International Union. Having failed to do so, he has also failed to exhaust his administrative remedies with regard to these subsequent actions of the International Union. Since such exhaustion is required by the International Contract, as well as by 29 U.S.C. § 411(a) (4)[8], Defendants are

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[8] 29 U.S.C. § 411(A) (4) provides, in pertinent part:

> That any such member may be required to

entitled to summary judgment on all claims stemming from these subsequent events.

D. CONCLUSION

Canez has failed to show that he is entitled to judgment as a matter of law. Furthermore, he has failed to demonstrate that there is a genuine issue as to any material fact that would prevent summary judgment from being entered on behalf of Defendants.

IT IS THEREFORE ORDERED that:

1. Plaintiff's Motion for Partial Summary Judgment [Document #78] is denied.

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exhaust reasonable hearing procedures (but not to exceed a four month lapse of time) within such organization, before instituting legal or administrative proceedings against such organization or any officer thereof...

2. Defendants' Motions for Summary Judgment [Documents #85 & 91] are granted.

3. The clerk of the court shall enter judgment accordingly.

DATED this 1st day of March, 1993.

STEPHEN L. VERKAMP
United States
Magistrate Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK L. CANEZ,	)	
	)	
Plaintiff-Appellant,	)	No. 93-15653
	)	93-15986
v.	)	
	)	
	)	D.C. No.
	)	CV-90-01614-EHC
LABORERS' INTERNATIONAL	)	
UNION OF NORTH AMERICA,	)	MEMORANDUM
LOCAL UNION NUMBER et al.	)	
	)	
Defendants-Appellees.	)	
	)	
	)	

Appeal from the United States District Court for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Submitted and Argued November 17, 1994
San Francisco, California

Before: LAY, ** PREGERSON, and O'SCANNLAIN, Circuit Judges.

Frank Canez appeals the district court's grant of summary judgment and costs in favor of appellees, Laborers' Interna-

tional Union of North America, et al. Canez claims that his free speech and due process rights under Section 101 of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411 (1973), and his due process rights under the Uniform Local Union Constitution, were violated when he was removed from his position as Business Manager/ Secretary-Treasure of Local 383. We affirm.

BACKGROUND

In 1986, Frank Canez was elected Business Manager/Secretary-Treasurer of Local 383. When he became Business Manager, he automatically became a trustee of the Laborers' Pension fund. In February 1990, two events occurred that triggered the controversy in this case. First, Canez took a loan of $1500 from union funds and did not officially report it. Second, a letter, which Canez knew to be misleading, was sent

to all the Pension Fund participants assuring them that over $50 million in losses to the Fund were recoverable. Barry Hinkle, then a lawyer for Local 383, played a role in both these events. Canez consulted Hinkle before taking the personal loan, and Hinkle advised Canez that taking the loan would be legal. On a separate occasion, when Canez asked Hinkle about the Pension Fund losses, Hinkle told him not to share his concerns with the union membership.

In May 1990, the International Union appointed David Jacobs, an auditor, to conduct an investigation into the financial practices of Local 383. He made a report to the Local Union Executive Board in which he revealed, among other things, that Canez had taken the personal loan. At a special meeting on August 8, 1990, the Executive Board voted to remove Canez from his position as

Business Manager/Secretary-Treasurer, having been advised that Canez was automatically unbonded due to unauthorized expenditures, and that it would be illegal to let him retain his position. At a second meeting on August 10, 1990, the Board ratified its actions. Canez did not have formal, written notice of the meetings.

On October 3, 1990, the Executive Board filed formal charges against Canez. Every member of the Executive Board signed the charges. According to Article XII of the Uniform Local Union Constitution, usually a Trial board, composed of members of the Executive Board, would hear the charges, and then the union membership would ratify the Board's decision. Because all the members of the Executive Board had signed the charges, the Board referred the matter to International's General President, pursuant

to Article XII of the Local Constitution. The General President appointed a Hearing Panel of one party to hear the charges. The trial began on November 21, 1990 and lasted five days. Canez and counsel were present.

Meanwhile, Canez filed for a preliminary injunction in United States District Court on October 17, 1990. The court granted his motion on November 28, 1990, and he was reinstated. In February 1991, the Hearings Panel issued a final decision, adopted by the General Executive Board on February 11, 1991, recommending that Canez be removed from his official positions. It found that Canez had breached the trust of his office by failing to acknowledge the loan, but cleared him of seven other charges. On June 10, 1991, the Executive Board removed Canez from office.

After the hearing, the district court

reviewed the preliminary injunction that it had granted Canez, decided that Canez had received due process, and lifted the injunction on June 5, 1991. After the case was transferred to a magistrate, each side filed a motion for summary judgment. The court granted the defendants' motion. Canez appeals.

ANALYSIS

We review a grant of summary judgment de novo. Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). When a party moves for summary judgment, the court must grant the motion "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Canez raises several issues on appeal.

A. The Free Speech Claim.

Canez contends that his speech rights, guaranteed under 29 U.S.C. 411 (a) (2), section 101 of the LMRDA, were violated because he was dismissed from his position as Secretary-Treasurer for speaking out about the pension fund losses. Canez argues that the close timing of his remarks about the pension fund and of the audit which lead to his ousting supports an inference that he was improperly dismissed. He also notes that Hinkle told him not to speak to the membership about the pension fund losses.

Ninth Circuit cases, while they protect union members' speech rights, demand "substantial" evidence that a purported reason for the member's discipline is just a pretense for the punishment of speech. See Bise v. Int'l Brotherhood of Electrical Workers, Local 1969, 618 f.2d 1299, 1304 (9th Cir. 1979) ("substantial" evidence on

the files that the reason for the punishment was protected activity), cert. denied, 449 U.S. 904 (1980). Viewing the facts in the light most favorable to Canez, as we must in summary judgment analysis, Roberts v. Continental Insur. Co., 770 F.2d 853, 855 (9th Cir. 1985), we agree with the district court and the defendants that Canez failed to provide enough facts from which a fact-finder reasonably could draw an inference that Canez was dismissed for his speech.

But even if Canez did have enough facts to support his argument that he was dismissed because he engaged in protected speech, he still would not be able to overcome a summary judgment motion. His claim of protected speech does not automatically immunize him from discipline on other grounds. Ferguson v. Int'l Ass'n of Bridge Workers, 854 F.2d 1169, 1175 (9th Cir. 1988)

(union members who engaged in leafleting and other protected speech can still be properly disciplined for "dual unionism").

In the two cases where we found that there was a possibility that the plaintiffs were wrongly disciplined for protected conduct, the reasons the superiors gave for the union members' discipline were questionable. See Bise, 618 F.2d at 1304 (implication that the discipline was improperly imposed because charges against union members included conduct that was clearly permissible); Ornellas v. Oakley, 618 F2d 1351 (9th Cir. 1980) (whether accusations of misconduct are false is a material issue because it my suggest discipline was improperly imposed). However, in Ferguson, 854 F.2d at 1174, where we upheld the union members' discipline, there was ample evidence that the union members acted subversively. Likewise,

the record in this case indicates that Canez was properly ousted because of his conduct. We agree with the district court that Canez cannot defeat summary judgment on this claim because his conduct alone was enough to justify his dismissal.

B. Claims under the Local Constitution.

Canez contends that his right to due process under the Local Constitution was also violated. Alleged constitutional violations are cognizable in federal court under Section 301 of the LMRA, 29 U.S.C. § 185 (1985), as potential contract violations. Woodell v. IBEW, Local 71, 502 U.S. 93 (1991).

1. Timing of Hearing

First, Cnaez asserts that he should have had a full hearing before his dismissal on August 10, 1990. The Local Constitution provides for such a hearing in Article XII.

We agree with the district court that we must defer to the General Executive Board's finding that the emergency action of the Executive Board was permissible under the Local Constitution. See Building Material and Dump Truck Drivers, Local 420 v. Martino, 867 F.2d 500, 511 (9th Cir. 1989) (courts should be highly deferential to a union's interpretation of its own governing documents).

Next Appellant argues that he was entitled to a full hearing on the charges within thirty days of his dismissal. The General Executive Board agreed that Canez's full hearing came later than it should have. (E.R. 16, ¶ 10). The Board also found, however, that "[b]ecause Canez was removed from office for misconduct, he suffered no injury by the Executive Board's failure to provide him a hearing on disciplinary

charges within a reasonable period after his removal on August 8." (E.R. 16, ¶ 19).

The question whether constitutional due process rights have been violated is not a results-oriented inquiry. Union members are entitled to due process whether or not they are guilty. Canez's rights under the Local Constitution were violated when he did not receive his hearing on time, even though he had been dismissed for misconduct. In some situations, the timing of a hearing could prove critical to a plaintiff. In this case, however, Canez has failed to suggest any kind of specific prejudice. We therefore agree with the district court that this issue does not need to be tried because Canez has failed to present any evidence to show that he suffered any harm.

2. Trial Board of Local Members

Canez next contends that his Local

constitutional rights were violated when Ramon Morales, then a member of the Executive Board, did not impanel a Trial Board to hear his case. We agree with the district court that this argument lacks merit. The Local Constitution provides that members of the Executive Board of the Local Union will constitute the Trial Board that hears charges against an officer. Uniform Local Union Constitution, Article XII, section 3. Members are disqualified if they are the charging party, or interested in the litigation. The Local Constitution further provides that "[w]here the entire Executive Board...appears to be disqualified, the matter may be referred to the General President...." Id.

All the members of the Executive Board signed the charges against Canez. Canez argues that Morales, though he also signed

the charges, was not "interested" because he did not take part in the hearings on October 8th and 10th. The Local Constitution is clear: Morales signed the charges and was therefore disqualified. He had no duty to impanel a Trial Board, and Canez's hearing was properly referred to International's President.

3. Vote by Union Members

Canez claims that he had a right to have his charges voted on by the general union membership. Canez asserts that the Local Constitution provides a way for union leadership to bypass the general union membership by referring hearings to the General President. When the Trial Board conducts the hearing, the local union votes on its findings. Local Constitution, Article XII, section 6. When the case is referred to the General President, however,

it may remain with the General Executive Board for "final decision and disposition." Id. section 3.

Canez brings his claim under 29 U.S.C. § 185, claiming that he did not receive due process under the Local Constitution. But the process he protests is provided by the Local Constitution itself. Canez thus has no claim under § 185.

C. Voting Rights under §411.

Alternatively, Canez argues that the right of union members to vote, guaranteed by 29 U.S.C. § 411 (a) (1), required a vote the general membership on his discipline. The provision states: "Every member of a labor organization shall have equal rights and privileges ... to nominate candidates, to vote in elections or referendums ... subject to reasonable rules and regulations in such organization's constitution and

bylaws. 29 U.S.C. § 411 (a) (1).

The first issue is whether the union membership should have voted on the Local Executive Board action of August 10. Because the Hearings Panel found that the Board had properly acted in an emergency, its action was not subject to rules of Trial Board proceedings. Therefore there was not requirement of a general union membership vote.

Second, Canez challenges the Local Constitution itself. He asserts that the procedure by which charges are referred to the General President violates § 411 (a) (1) because it denies the union membership the right to vote on important issues.

None of the cases Canez relies on suggest that the union's procedure for charging officers violates § 411. The Supreme Court has stated that the relevant

inquiry is whether the voting procedure at issue is "reasonable." United Steelworkers of America v. Sadlowski, 457 U.S. 102, 111 (1982) (White, J., dissenting). Local's procedure for charging and trying officers is "reasonable" on its face because it allows the General President to step in when the Local membership is biased. None of the cases Canez cites challenges this common-sense view.

D. Exhaustion of Remedies.

29 U.S.C. § 411 (a) (4) requires that union members exhaust internal remedies "but not to exceed a four month lapse of time" before instituting legal proceedings. Appellant claims that he satisfied this requirement. We agree. In Ornellas v. Oakley, 618 F.2d 1351, 1354 (1980), we held that "a person has adequately exhausted her [intraunion] remedies where her remaining

appeal within the union lies beyond a four month period."

The district court correctly stated that Canez had a duty under Article VIII of the International Constitution to appeal to the Regular Convention of the International Union. But Canez points out that the Regular Convention meeting following the General Executive Board's disposition in February 1991 was held in September 1991. Therefore, Canez did not need to appeal to the Convention because his next available appeal was more than four months away. Canez was properly before the district court.

E. Costs.

We review a district court's decision to award costs for abuse of discretion. Ass'n of Flight Attendants v. Horizon Air, 976 F.2d 541, 511 (9th Cir. 1992). The

issue is whether Canez is a "prevailing party" in the context of a Rule 54 (b) motion for costs.

We find that the district court did not abuse its discretion when it failed to characterize Canez as the "prevailing party." If Canez had won permanent relief, he clearly would have been the "prevailing party." Though Canez did cause the defendants to alter their conduct, Hewitt v. Helms, 482 U.S. 755, 761 (1987), the change was only temporary, not a "resolution" of the dispute. See Texas State Teachers v. Garland Indep. School Dist., 489 U.S. 782, 783 (1989) (to be considered a "prevailing party," plaintiff "must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant") (emphasis added); Markham v. Int'l Ass'n of Bridge Workers, 901 F.2d 1022

(9th Cir. 1990) (no costs awarded to plaintiffs who won a preliminary injunction for a hearing because they did not win a permanent dissolution of the trusteeship, and because the hearing would have occurred regardless of their actions).

Canez could have been the "prevailing party" despite not winning permanent relief if he had gained relief independently of his suit, making the injunction and any further pursuit of legal action unnecessary. Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980) (plaintiffs awarded attorney fees despite preliminary injunction being vacated because the relief they sought was achieved independently of them), cert. denied, 450 U.S. 1012 (1981). Canez, however, has yet to receive the relief he wants.

Finally, the district court did not need to explain its rationale for not

awarding costs to Canez because he was not the "prevailing party." Trans Container Services v. Security Forwarders, Inc., 752 F.2d 483, 488 (9th Cir. 1985) (trial court should state reasons for denying costs to the prevailing party).

To summarize, we affirm the district court on all issues except the exhaustion of remedies claim. Affirmed.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FRANK L. CANEZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV 90-1614 PHX SLV
	)	
	)	
LABORERS' INTERNATIONAL etc., et al.,	)	O R D E R
	)	
Defendants.	)	
	)	

Background

Plaintiff, Frank L. Canez has been a member of defendant Construction Production Maintenance Laborers' Union, Local Union Number 383 (Local 383) for many years. Canez was elected Business Manager/ Secretary-Treasurer, the chief executive

officer, of Local 383 in June of 1986.[1] Plaintiff was re-elected to that position in June of 1989.

The defendant Laborers' International Union of North America (International) is an international laborers' union which maintains affiliations with local laborers' unions such as Local 383.

Local 383 was required to pay the International "per capita" dues of approximately $10,000 per month in 1989. As a result of a state court judgment of $458,000 against it and the decline of the construction industry, Local 383 was unable to pay the dues owed to the International for several months of 1989 and into 1990.

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[1] The International provided Emilio Torres, a former Business Manager of the Tucson Laborers' Union and a member of the International's staff to advise Canez in carrying out the duties of his office. Torres commuted from Tucson and his salary was paid by the International.

In April of 1990 the International notified Canez that an audit was required of Local 383's books and records. In May of 1990, David R. Jacobs, an area auditor for the International, began auditing the finances and activities of Local 383. It is alleged by defendants' that Jacobs discovered discrepancies in Local 383's financial records and that approximately $6,000 was unaccounted for.

At some time on July 23, 1990 Jacobs advised Canez of the discrepancy. Canez informed Jacobs that he did not know why there was a shortcoming in Local 383 funds. Canez did, however, disclose, at some point that day, to Jacobs that he had borrowed $1,500 from Local 383 funds in February, 1990.

Plaintiff borrowed $1,500 from the union in February, 1990 to help pay for his

father's funeral and burial expenses. Canez claims that Barry Hinkle, an attorney who represented the International, advised him that he could borrow up to $2,000 from the Union on a short-term basis but did not advise him that approval of the Executive Board was necessary. Canez did not obtain approval of the Executive Board of Local 383 prior to borrowing the $1,500 which the defendants contend is necessary for the issuance of such a loan. No report was made, or voucher found in the financial records indicating Canez borrowed money from the Union. Canez testified that he believed Sally Garcia, Local 383's bookkeeper had placed a "chit" in the records.

Jacobs informed Canez that he had to resign because he borrowed money without first obtaining approval of the Executive

Board. Canez repaid the $1,500 on July 26, 1990.

At an Executive Board meeting on July 28, 1990 Canez informed the Board that he had borrowed money and offered to pay interest on the loan. The Executive Board did not approve or ratify the loan.

On August 8, 1990 the Executive Board held a special meeting and removed Canez from office. The action of the Board relied on a memorandum legal opinion of the International's attorney which stated that because Canez had taken an unauthorized loan his bonding was automatically forfeited and he therefore could not legally hold his office pursuant 29 U.S.C. § 502. The board was also informed that each member could be liable for any action of Canez regarding Local 383 funds because they knew of his "illegal" conduct. Canez was not present at

this meeting. He claims that he did not receive notice of the meeting.

A similar meeting was held by the Executive Board on August 10, 1990. The plaintiff was informed of this meeting only a few hours prior to its occurrence. Plaintiff did not attend this meeting, because he had a previously scheduled meeting with his attorney.

Jacobs advised Canez on August 9, 1990 that he had been removed ("ousted") from office and requested that plaintiff turn in his keys. Canez refused to abide by Jacobs' request. Jacobs told him that if he did not leave the Local's office, the police would be called to remove him. Canez left to avoid a public disturbance. The locks of Local 383 headquarters were then changed. On August 14, 1990 Canez was given a letter that he had been removed from the office of

Business Manager/Secretary-Treasurer of Local 383.

At approximately this point in time Canez received his last pay check which included two weeks vacation pay.

Earl Nelson (Local President) was elected by the Executive Board to replace Canez as the Business Manager of Local 383.

Regularly scheduled membership meetings were held on August 25, 1990 and September 29, 1990. Canez was present at both meetings. The evidence presented at the hearing established that the membership did not actually vote on whether to approve the ousting of Frank Canez in any reliable or orderly procedure at either meeting. It is apparent that the meetings were disrupted and did not proceed in a "normal" fashion.

In order to verify Jacobs' findings, the International hired the accounting firm

of Van Keulen & Lumer to make a further audit. On October 1, 1990 Van Keulen & Lumer issued a report which found that Local 383 funds (approximately $12,000) were missing and unaccounted for. Canez had employed and accountant in earlier in 1990 (recommended by a representative of the state AFL-CIO) to review the Local's financial records.

By way of a letter dated October 3, 1990 from the International, Frank Canez was informed of the charges which the Executive Board of Local 383 brought against him.

On October 17, 1990 the plaintiff filed this action claiming that he was wrongfully removed from office. Plaintiff also seeks a preliminary injunction reinstating him to his union office and enjoining defendants from interfering with certain activities of Canez.

A Hearings Panel of the General Executive Board was appointed by the General President of the International to hold a hearing on the charges against Canez on November 21, 1990. Plaintiff does not dispute that he was adequately notified of that hearing.

An Order to Show Cause hearing was held by this Court on November 20, 1990. The Court limited its inquiries to the procedural aspects of Canez's removal and his due process claim.

Discussion

Canez asserts that he was removed from office in violation of 29 U.S.C. § 411 and the Uniform Local Union Constitution and is therefore entitled to injunctive relief in the form of reinstatement to his position as Business Manager/Secretary-Treasurer of Local 383. Defendants claim that the action

of the Executive Board did not violate §411 and that in any event Canez could not have legally maintained his position in the union because he had violated the conditions of his bond by admitting that he took $1,500. Defendants also assert that plaintiff has not exhausted available internal union remedies and can make no showing of irreparable injury which would entitle him to injunctive relief.

A party requesting a preliminary injunction must show either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor. Johnson Controls v. Phoenix Control Systems, 886 F.2d 1173, 1174 (9th Cir. 1989) citing Dumas V. Gommerman, 865 F.2d 1093, 1095 (9th Cir. 1989). Plaintiff has estab-

lished that he is likely to succeed on his claim that he was not given the due process required by 29 U.S.C. § 411 and the Uniform Local Union Constitution.

The Bill of Rights of Members of Labor Organizations provides:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. § 411(5).

ARTICLE XII of the Uniform Local Union Constitution states in pertinent part:

> Section 1. An officer or member in good standing may prefer charges against any other officer or member of a Local Union, by filing written charges in duplicate with the Recording Secretary of the Local Union. These charges must ... indicate the provisions of the Constitution to be relied upon, or the agreement or rule

alleged to have been violated, and must set forth the specific violation...

Section 2. The Recording Secretary shall promptly notify the members of the Executive Board that charges have been filed,...., shall promptly set a date for a hearing and trial on said charges. Immediately thereafter, a copy of the charges shall be mailed to the accused ... A written notice of the time and place where the hearing and trial will take place ... shall be mailed to the accused .. not less than seven days nor more than twenty-one days from the date of said hearing or trial.

Section 3. The members of the Executive Board of the Local Union shall constitute the Trial Board; except that neither the charging party nor the accused nor any member directly interested or involved in the charges may sit as a member of the Trial Board...

Where the entire Executive Board ... appears to be disqualified, the matter may be referred to the General President who shall be entitled to investigate to determine whether such disqualification exists. Upon a finding of disqualification, the General President shall have discretion to assume original jurisdiction over such charges, in which case he shall appoint a Hearings Panel of

the General Executive Board to hear such charges and report findings and recommendation to the General Executive Board for final determination, the General President may refer the charges to the appropriate District Council for trial.

...

Section 4. The hearing and trial shall be conducted in and orderly, fair an impartial manner and should assure the full presentation of all the facts to the Trial Board.

Section 5. The Trial Board shall record minutes of its meetings and proceedings...

Upon conclusion of the hearings, the Trial Board shall consider all of the evidence and argument submitted and proceed to make its findings and decision. It shall prepare a Report of said findings and decision,... The Recording Secretary shall forthwith mail a copy of said Report to ... the accused...

Section 6. A copy of the Trial Board Report shall be submitted to the next regular meeting of the Local Union. The findings and decision of the Trial Board shall be binding unless and until two-thirds of the members present and voting at said meeting reverse or modify the findings and deci-

sion...

A violation of § 411 occurs when a Local Board does not provide a member of the union with a full and fair hearing before imposing discipline. **See** Bldg. Material & D. Tr. Dr. Local 420 v. Traweek, 867 F.2d 500, 510 (9th Cir. 1989). **An** essential element of a full and fair hearing is an impartial tribunal which arrives at a decision on the basis of evidence which the accused has an opportunity to confront and rebut. Tincher v. Piasecki, 520 F.2d 851, 854 (7th Cir. 1975).

No evidence was presented establishing that a charge was preferred by a member or officer of Local 383 prior to the august 8 or August 10, 1990 Executive Board meetings. Accordingly, Canez was never notified in

writing[2] of any charges against him or the date and time of a hearing on these charges. Defendants contend that Canez was notified of the hearings; assuming these contentions are true Canez was verbally notified hours or at the most a day prior to the hearings. The purported notice to Canez was neither in writing nor was he given a reasonable period of time prior to the hearing as required by Uniform Local Union Constitution and 29 U.S.C. § 411 (5).

Given the facts presented at the Order to Show Cause Hearing plaintiff was not afforded or given the opportunity for a full and fair hearing as mandated by § 411.

Furthermore, no "Report" indicating the

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[2] A union member subject to discipline must be served with written charges specific enough to inform the accused member of the offense he has allegedly committed. International Bro. of B., I. S., B., F., & F. & H. v. Hardeman, 91 S.Ct. 609, 616 (1971).

findings of the Executive or "Trial" Board was presented to this Court. Presumably one was never prepared. Such a Report, if any, was never submitted to or approved by the members of Local 383 at the next regular meeting as provided by Section 6 of Uniform Local Union Constitution.

As mentioned above, in challenging the imposition of a preliminary injunction defendants argue that plaintiff has not stated a claim under 29 U.S.C. § 411 because he has failed to exhaust available internal union remedies. In support of this defendants cite the Constitution of the Laborers International Union (Article XIII, Section 7) which provides that a Local Union officer may not bring a cause of action in any court without first exhausting all remedies available under the Union Constitution. However, because there were no formal charges or

findings of the Executive Board made, despite Canez's request for such documents, and no hearing which satisfies the requirements of federal statute and union constitutions, there was nothing to appeal.

The plaintiff has established that he is likely to succeed on the merits of his claim that he was removed from office in violation of the procedures required by 29 U.S.C. § 411. Frank Canez was in practical effect, removed from office in violation of 29 U.S.C. § 411 and the Uniform Local Union Constitution.

Defendants contend that Canez cannot establish irreparable harm because he has adequate remedies in the form of internal union appeal. It was also argued at the hearing that plaintiff could be adequately compensated for any damage he suffered by a monetary award. Defendants' contention is

incorrect. Plaintiffs who are likely to succeed on the merits of their claim need only show the likelihood of irreparable harm to merit the award of a preliminary injunction in their favor. People of California v. Tahoe Regional Plan Agency, 766 F.2d 1308, 1316 (9th Cir. 1985).

Canez was lawfully elected and his unlawful removal from office deprived him of his rights to that office. It also deprived Local 383 members of the leadership which it elected to that office. The manner in which Canez was ousted from office prevents he and the members of the Union from appealing, challenging, reversing or modifying the decision of the Executive Board. There was no Report from which Canez could appeal or which the members of Local 383 could reverse or modify.

Furthermore, monetary damages are

insufficient. The actions of the Executive Board constitute a direct and immediate interference with the rights of Canez and the members of Local 383. The effect of the Executive Board's actions in violating the federal statute go beyond mere monetary damage to Canez. The removal of a union officer without due process does significant and continuing damage to the system of union membership and the union's elective process as protected by statute and union constitution.

The violations of the rights of Canez and the Union members can only be "repaired" by the reinstatement of Canez pending appropriate actions consistent with law. Accordingly,

IT IS ORDERED that Frank Canez be reinstated to the position of Business Manager/ Secretary-Treasurer of Local 383, effective

immediately.

IT IS FURTHER ORDERED that Construction Production Maintenance Laborers' Union, Local Union Number 383 and Laborers' International Union of North America are enjoined from removing Frank Canez from that office without first providing him with full a fair hearing as provided by 29 U.S.C. § 411 and Uniform Local Union Constitution.

IT IS FURTHER ORDERED that any suspension or removal of Frank Canez from office must first be approved by this Court.

IT IS FURTHER ORDERED that Frank Canez is enjoined from disbursing, approving the disbursal or in any way handling the funds of Local 383, pending further of order of this Court.

DATED this 28th day of November, 1990

Earl H. Carroll
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FRANK L. CANEZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV 90-1614
	)	PHX SLV
	)	
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, et al.	)	O R D E R
	)	
Defendants.	)	
	)	

On November 30, 1991 this Court entered a preliminary injunction which ordered that: Frank Canez be reinstated to the position of Business Manager/Secretary Treasurer of Construction Production Maintenance Laborers' Union, Local Union Number 383 (Local 383); Local 383 and Laborers' International Union of North America (International) are enjoined from removing Canez from office without a full and fair hearing as provided by 29 U.S.C. § 411 and the Uniform Local Union

Constitution; any suspension or removal of Canez from office must be approved by the Court and that Canez is enjoined from disbursing, approving or handling the funds of Local 383. The preliminary injunction was entered because of defendants' failure to comply with the due process requirements of 29 U.S.C. §411 and the Uniform Local Union Constitution.

Local 383 moved for reconsideration on December 5, 1990 contending that: (1) 29 U.S.C. § 411 does not apply to suspension or removal from union office; (2) the requirement that any removal of Canez from office be approved by the Court improperly shifts the burden of proof: and (3) the Court erred in not requiring Canez to post a bond.

Hearings, conducted by a Special

Hearings Panel of the International (Panel)[1], on the charges against Canez were held on November 21, December 7-8 and 17-18, 1990. On February 20, 1991 the Panel issued Findings of Fact and Recommendation. The Panel found that "[i]n failing to acknowledge the [$1,500] loan, Canez breached the fundamental trust of his office." Findings of Fact and Recommendation, Paragraph 18. As a result of this "breach of trust" it was recommended that Canez be removed from his office as Business Manager/Secretary-Treasurer.

Local 383 filed a "MOTION TO LIFT INJUNCTION AND FOR APPROVAL FOR THE REMOVAL FROM OFFICE OF PLAINTIFF PURSUANT TO ORDER OF NOVEMBER 28, 1990" on March 5, 1991. The Motion was argued on March 11, 1991;

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[1] The "Panel" consisted of one International official.

plaintiff and the International were given additional time to file a response to Local 383's motion. The International filed a "MOTION TO LIFT INJUNCTION AND PROPOSED ORDER" on March 19, 1991. Plaintiff filed a response to Local 383's motion on March 20, 1991.

Discussion

MOTION FOR RECONSIDERATION

APPLICATION OF § 411

Local 383 argues that 29 U.S.C. §411 only applies to the loss or suspension of union membership not a union office. Therefore, it is contended that because Canez's union membership rights were not affected by his removal from office he has no cause of action pursuant to § 411. This issue was not raised or presented in the preliminary injunction oral argument or briefs.

Local 383 is correct that §411 (a) (5)

does not protect union officers from summary removal from office. Kinney v. International Brotherhood of Electrical Workers, 669 F.2d 1222, 1226 (9th Cir. 1982). Section 411 (a)(5) does not cover suspension or removal from a union office. Id. Accordingly, plaintiff's §411 claim cannot support the preliminary injunction. However, the preliminary injunction was not entered solely on the basis of §411. The preliminary injunction rested in substantial part because Local 383 removed Canez from office without complying with the provisions of the Uniform Local Union Constitution (Local Constitution).

Construing the complaint liberally, plaintiff has stated a cause of action for the violation of his rights as protected by the Local Constitution. Nonetheless, it does not appear that this Court has

jurisdiction over a § 185(a) claim based upon a violation of a local constitution because a local constitution is not a contract between **labor organizations** which makes § 185(a) applicable. **SEE** Alford v. National Post Office Mail Handlers, 576 F.Supp. 278 (E.D. Missouri 1983).

The question of the International's violation of the International Constitution was not evaluated during the preliminary injunction hearing. Any alleged violation of the International Constitution by the International cannot, at this time, support the preliminary injunction issued.

Plaintiff contends that his rights of free speech and assembly were violated, thus, even if Canez's removal from office cannot be challenged pursuant to §411(a) (5) he asserts he has stated a claim cognizable under § 411(a)(1) and (2). It is alleged

that Canez was removed from his elected position to prevent him from: continuing his investigation into Pension Fund losses; from speaking to Local 383 members at membership meetings concerning Pension Fund losses; and continuing his cooperation with criminal investigators investigating Pension Fund losses. As a result, it is contended that the preliminary injunction is fully supported by the pleadings, the evidence and the law.

The Bill of rights of Members of Labor Organizations ("Bill of Rights" provides:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established rules pertaining to the conduct of the meetings....

29 U.S.C. §411(a) (2). The "Bill of Rights" was designed to guarantee every union member equal voting rights, rights of free speech and assembly and the right to sue. Sheet Metal Worker's Intern. Ass'n v. Lynn, 109 S.Ct. 639, 643 (1989). The basic objective of Congress in enacting the "Bill of Rights" was to ensure that unions are democratically governed and responsive to the will of their memberships. Id. In Lynn, an elected Union official, Lynn, was removed from office by an appointed union trustee for speaking out against a proposed dues increase. The Supreme Court held that Lynn's retaliatory removal stated a cause of action under § 102 (29 U.S.C. § 412).[2] Id. at 645.

Plaintiff has stated a claim for a

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[2] This section of the Labor Management Reporting and Disclosure Act allows a person to bring a civil action for violations for any rights secured by the "Bill of Rights."

violation of § 411(a)(2), however, no substantial evidence supporting this claim was presented at the preliminary injunction hearing. The fact that Canez asserts the freedom of speech protection of § 411(a)(2) does not immunize him from discipline for financial misconduct of a union officer. Ferguson v. International Association of Bridge, Structural and Ornamental Iron Workers, 854 F.2d 1169, 1174 (9th Cir. 1988) (The fact that speech critical of a union officer is protected under §411(a)(2) does not immunize union members from discipline for both dual unionism and speech). Even though plaintiff may be able to demonstrate his §411(a)(2) claims at trial he has not established probable success on the merits for purposes of a preliminary injunction because adequate grounds for Canez's removal were established at the hearing before the

Panel which do not involve any free speech issues. The balance of hardships no longer tip sharply in favor of the plaintiff, given his administrative hearings in November and December, 1990.

MOTION TO LIFT INJUNCTION AND APPROVAL OF CANEZ REMOVAL

Local 383 and the International have moved this Court to lift the injunction as plaintiff has been provided a full and fair hearing and a Special Hearing Panel of the International Union determined that Canez should be removed from office for his failure to disclose, and affirmative efforts to prevent, disclosure of the $1500 "loan" he took from union funds.

Local 383 claims that plaintiff has not been given due process as required by the Local Constitution and thus the necessity for the preliminary injunction no longer

exists. The International agrees with Local 383, contending that Canez was given a full and fair hearing and the discipline meted against him as an elected union official did not violated his rights of free speech as provided by 29 U.S.C. § 411(a)(1) and (a)(2).

Plaintiff contends: (1) the provisions of the Local Constitution which allow the Executive Board to bypass the membership in removing an elected official is a per se violation of §411(a)(1) & (2); and (2) plaintiff did not receive a full and fair hearing.

In support of this claim of an inadequate hearing, Canez maintains: (1) the hearing was before the wrong tribunal; (2) the Hearings Panel Officer was biased as a matter of law; (3) a critical witness, Barry Hinkle, served as prosecutor; (4) Canez was

denied right to call Sally Garcia; and (5) the proceedings were tainted by an attorney for the International who acted as an advisor for the Hearings Panel.

The provisions of the Local Constitution which gives the International original jurisdiction when the Executive Board is disqualified do not per se violate §411(a)(1). There is no authority presented supporting plaintiff's contention.

Canez's claims that he was not given a full and fair hearing are insufficient to support continuation of the injunction. Canez seeks to have this Court maintain an injunction on the basis of inferences of the International's alleged misconduct. Inferences are insufficient to show a likelihood of success or to create serious questions going to the merits of this action.

The preliminary injunction was made

necessary by defendants' denial of due process to Canez. Plaintiff has now been provided with due process that he is entitled to under the Local Union Constitution.

Accordingly,

IT IS ORDERED granting Local 383's motion for reconsideration and motion to lift the injunction.

IT IS FURTHER ORDERED vacating the preliminary injunction entered by this Court on November 28, 1990.

IT IS FURTHER ORDERED setting a status conference to discuss further proceedings in the case at 4 p.m., July 1, 1991.

DATED this 5th day of June, 1991

Earl H. Carroll
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK L. CANEZ, Plaintiff-Appellant, v. LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NUMBER et al.) Defendants-Appellees.	No. 93-15653 93-15986 D.C. No. CV-90-01614-EHC ORDER

Before: LAY, ** PREGERSON, and O'SCANNLAIN, Circuit Judges.

The memorandum disposition filed November 23, 1994 is amended as follows: On page 4, the last paragraph, strike the following "Ninth Circuit cases, while they protect union members' speech rights, demand 'substantial' evidence that a purported reason for the member's discipline is just a pretense for the punishment of speech. See

Bise v. Int'l Brotherhood of Electrical Workers, Local 1969, 618 F.2d 1299, 1304 (9th Cir. 1979) ('substantial' evidence on the files that the reason of the punishment was protected activity), cert. denied, 499 U.S. 904 (1980)."

With this amendment, the petition of rehearing is denied and the suggestion for rehearing en banc is rejected.

** The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FRANK L. CANEZ, Plaintiff, v. LABORERS' INTERNATIONAL UNION OF NORTH AMERICA; et al., Defendants.	)	No. CIV 90-1614 PHX SLV **AFFIDAVIT OF FRANK CANEZ**

STATE OF ARIZONA)
) ss.
County of Maricopa)

FRANK CANEZ, being first duly sworn upon oath, deposes and says:

1. That I am the plaintiff in the above-captioned matter; that I have read the foregoing Response to Defendants' Motions for Summary Judgment, know the contents

thereof, and that all matters and things stated therein are true, and I swear to the factual accuracy of the matters stated as attributable to me.

2. I was a Trustee of the Laborers Pension Fund from 1986 until I was removed from that position by virtue of being removed as the Business Manager/Secretary-Treasurer of the Local on August 8, 1990. Attorney Barry Hinkle was the lawyer for Local 383, was my personal lawyer in connection with advising me regarding Local 383 and Pension matters, and Hinkle was attorney for me and other trustees of the Pension Fund in our status as trustees. Mr. Hinkle also represented Hermillo Torres who was an employee of the International who sat as a Pension Fund trustee. When I discovered the Pension Fund losses, Hinkle and Torres admonished me not to discuss this with the

membership of Local 383. In February 1990, a letter was sent to the Pension Fund participants. This letter contained false information and omitted important factual information. It led the members to believe that their Pension Funds were safe and secure when Hinkle and Torres know that losses of upwards of $70 million either had been or would be sustained as a result of violation of law in relation to the administration of the Trust. Hinkle and Torres were attorney and trustee, respectively, when these losses were sustained. When I complained about the letter of February 1990, I was admonished not to discuss with the membership of Local 383 my suspicions regarding defendants' possible liability for allowing these losses to occur. I believe my removal as Business Manager/Secretary-Treasurer was done specifically to remove me

from my ex-officio position as trustee of the Pension Fund and to prevent me from having access to Pension Fund data that would possibly prove defendants' wrongful conduct. I believe that, based upon the entire course of conduct engaged in by defendants, I was denied my free speech and voting rights assured under § 411 in direct retaliation for my having gone to the FBI to advise it of defendants' wrongdoing and because I was repeatedly challenging defendants and attorney Hinkle regarding the failure to disclose and investigate the truth about the Pension Fund losses and attorney Hinkle's conflict of interest. In denying me these rights, defendants were taking away my individual membership rights because in addition to being the elected leader of the Local, I am also an individual member of the Local and an individual member

of the Pension Fund. I was seeking to vindicate my own individual rights in my individual capacity as well as trying to protect the interests of the other members when I went to the FBI and when I challenged Torres and Hinkle regarding the failure to disclose Pension Fund information and their failure to investigate further the Pension Fund losses.

3. Based upon my long experience with the Local and International Unions, and based upon my knowledge of how Union meetings should be conducted and how they were conducted in August and September of 1990, the Executive Board of Local 383 conducted the August 1990 and September 1990 meetings with the intent to stop the Union members from voting on my discipline. Also, I can say with assurance that the suspension of the membership meetings ordered by the

International Union was also conducted to prevent the Local Union members from voting on my discipline, and to deny me my rights as an individual Local member from being able to assemble with the Local members of Local 383 and to speak with them regarding Pension losses and to publicly challenge in the Local Union meetings defendants' continuing wrongful actions in regard to the Pension Fund losses.

_____

Frank Canez

SUBSCRIBED AND SWORN to before me this ___ day of September, 1992.

_____
Notary Public

My commission expires:

AFFIDAVIT OF FRANK CANEZ

STATE OF ARIZONA)
) ss.
County of Maricopa)

Frank Canez, being first duly sworn on oath, deposes and says:

1. Prior to taking the loan from Local 383 in February 1990, I consulted Barry Hinkle and received his legal opinion that I was allowed to take the loan. Mr. Hinkle never told me to leave a "chit" or receipt in the cash box or in the financial records of Local 383 which would indicate that I had taken a loan. Mr. Hinkle's only advice was that I could take the loan if I paid the money back. Mr. Hinkle also never told me that I needed to inform the Executive Board or the membership that I had taken the loan. I believe that when Sally Garcia handed me the $1,500, she made a notation in her records concerning the loan,

and since she herself was aware of the loan, I did not believe there was anything further that needed to be done.

2. In the August 1990 membership meeting, the membership of the Local voted to disapprove of the reading of the bills by an overwhelming majority, first by a voice vote and then by a division of the house. Despite the large majority voting down the bills of Local 383, the Executive Board refused to recognize the vote of the membership and walked out of the meeting.

3. At the September 1990 membership meeting of Local 383, the question was put to the membership whether to accept or reject the Executive Report on my summary removal from office. In a voice vote, and in a division of the house, the nays clearly had the overwhelming majority which rejected the Executive Board report. The president

of the Executive Board declared that the report was not accepted.

4. It is my understanding, based on my experience with Local 383 and its International Union, that the claim that I was removed from office because of the bonding requirement was just an excuse created by the defendants so they could remove me from office in order to stop me from talking about and investigating the Pension losses.

_____

Frank Canez

SUBSCRIBED AND SWORN to before me this _____ day of January, 1993, by Frank Canez.